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SERVICE DATE - JULY 31, 1998

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. 41287

MARMON HOLDINGS, INC.--PETITION FOR DECLARATORY ORDER--
RATES AND PRACTICES OF CERTAIN LTL MOTOR CARRIERS

Decided: July 22, 1998

This proceeding is before the Board on referral from the United States District Court for the Western District of Tennessee, Western Division, in Marmon Holdings, Inc. v. Transportation Distribution Services, Inc., No. 92-2386 GA (referral order dated March 17, 1994). In a decision served May 14, 1996, in response to a petition filed by Marmon Holdings, Inc. (Marmon or petitioner), we instituted a declaratory order proceeding to consider the issue of rate reasonableness. On consideration of the record before us, we find that Marmon has failed to establish that the rates it was charged by the defendant carriers were unreasonable.

BACKGROUND²

In its Federal District Court suit, Marmon is alleging that certain defendant motor carriers, principally less-than-truckload (LTL) carriers, defrauded one of its corporate divisions, Wells

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996. Although the Board retains jurisdiction to consider motor carrier rate and tariff issues in some contexts (see 49 U.S.C. 13701, et seq.), the matters presented here exceed the “functions retained.” Nevertheless, as the ICC had relevant jurisdiction when the court stayed its proceedings to allow petitioner to file its petition, and as we wish to be responsive to the court, we will give the court and the parties the benefit of our expertise. Reference to statutory and regulatory provisions will be to those that existed prior to enactment of the ICCTA, except where noted.

² The background of this proceeding is detailed in our decision served May 14, 1996. We will set forth salient facts here to the extent necessary for clarity.

Lamont. Wells Lamont is the largest manufacturer of work gloves in the United States, with distribution facilities in Illinois, New Jersey, Nevada, and Tennessee.

Marmon alleges that, from 1983 until February 1992, defendants participated with Robert Murphy, Wells Lamont's Vice President of Distribution, in a scheme whereby the LTL carriers paid Murphy "kickbacks" through a third party in exchange for receiving Wells Lamont's transportation business at higher than market rates. Under the alleged scheme, the carriers gave Wells Lamont discounts, but those discounts purportedly were "below market," i.e., the discounts were not as large as those that the carriers otherwise would have given a shipper of Wells Lamont's size. The carriers then paid 5% to 10% of the net revenues from Wells Lamont's business to a third party, which, in turn, cashed the checks and paid Murphy.³

In an order of March 31, 1993, the Federal District Court observed that Marmon did not allege that the carriers had charged them illegal (unfiled) rates, or that they had otherwise deviated from their filed tariff rates. Accordingly, the court found that Marmon's claim for damages ultimately went to the reasonableness of the tariff rates that the carriers had assessed. On March 17, 1994, the court granted Marmon's motion to stay the judicial proceeding to allow it to seek an ICC ruling on the reasonableness of the defendant carriers' rates.

In instituting this declaratory order proceeding, we indicated that we would limit our consideration to the rate reasonableness issue that the court referred. We stated that we intended to conduct a modified Georgia-Pacific type "cluster" analysis of defendants' rates. See Georgia-Pacific Corp.--Pet. for Declar. Order--Oneida Motor Freight, Inc., 9 I.C.C.2d 103 (1992) (GPac-I); 9 I.C.C.2d 796 (1993) (GPac-II); and 9 I.C.C.2d 1052 (1993) (GPac-III), aff'd sub nom. Oneida Motor Freight v. ICC, 45 F.3d 503 (D.C. Cir. 1995). Under Georgia-Pacific, we determine the reasonableness of a challenged rate by comparing it with a "market-based cluster of price/service alternatives for the issue traffic" or, in other words, rates "at which a shipper was willing to ship and a carrier was willing to transport the goods." GPac-I, 9 I.C.C.2d at 156; see also GPac-II, 9 I.C.C.2d at 806-09.⁴

³ Each of the four motor carriers that has participated in this Board proceeding is alleged to have paid a 10% fee.

⁴ In GPac-I, at 157, the ICC stated that relevant evidence could include "(1) other rates quoted by the same carrier, (2) contemporaneous rate offers from other carriers to move the traffic at issue, (3) rates for other shipments by the shipper under substantially similar transportation conditions (similar commodity, distance moved, volume, etc.) that moved at about the same time, (4) motor carrier contracts under which the shipment(s) at issue could have been made, (5) the rate originally charged for the shipment, (6) any other pertinent rates, and (7) other types of evidence, such as the shipper's private carriage alternatives." As we stated in our decision served May 14, 1996, petitioner's evidence could include rates and discounts defendants themselves offered Wells
(continued...)

We also stated in our decision that, in addition to addressing any Georgia-Pacific rate comparison evidence that might be filed, operating carrier defendants could respond to Marmon's showing by presenting evidence under the "honest, economical, and efficient management" standards of 49 U.S.C. 10701(e).⁵

In response to our decision, on August 16, 1996, Marmon filed an opening statement. Between October 31 and November 4, 1996, reply evidence and argument was submitted by four defendant carriers: Central Transport, Inc. (Central), Old Dominion Freight Line, Inc. (Old Dominion), TCX, Inc. (TCX), and New England Motor Freight, Inc. (New England). On November 20, 1996, Marmon filed rebuttal.

POSITIONS OF THE PARTIES

Marmon's Presentation.

Marmon submits testimony of Robert Murphy, in which Mr. Murphy admits his participation in the kickback scheme, presents the details of that scheme, and offers his opinion of the discounts Wells Lamont could have received but for the existence of the scheme.⁶

Mr. Murphy states that, sometime in the early 1980's, he and a sales manager with a named Memphis-based LTL carrier devised a scheme under which, in return for kickbacks, Mr. Murphy would agree to a discount rate for Wells Lamont's shipments that was less attractive than the discount rate carriers otherwise would have provided the shipper in arm's-length negotiations.

⁴(...continued)

Lamont before and/or after the alleged schemes were initiated and uncovered.

⁵ Section 10701(e) provides that "... in proceedings to determine the reasonableness of rate levels for a motor carrier..., the Commission shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses, including the operation of leased equipment and depreciation, plus a reasonable profit." Section 10701(e) is relevant here, as it relates to operating carriers, and at least four of the defendants—those that filed statements here—are still operating. We note, however, that none of the defendants has chosen to present evidence addressing these standards.

⁶ Mr. Murphy indicates that Wells Lamont's distribution system consists of the inbound shipment of raw materials and finished goods and the outbound shipment of finished goods. The finished goods consist primarily of work gloves, ski gloves, and dress gloves. Mr. Murphy states that in excess of 90% of the goods have a freight classification rating of 77.5. During the period under consideration, finished goods were shipped to customers at unspecified points, and to and between the company's distribution points at Menlo Park, CA, Reno, NV, Memphis, TN, Sayreville, NJ, and Chicago, IL. Mr. Murphy's testimony appears to relate only to the transportation of finished goods.

When the scheme began, Mr. Murphy tried to hide it from Wells Lamont by advising the company's management that they were obtaining discounts that were competitive with discounts being offered by various LTL carriers in the marketplace. Mr. Murphy then arranged for well-known national carriers—Consolidated Freightways, Inc. (Consolidated), Roadway Express, Inc. (Roadway), and Yellow Freight Systems, Inc. (Yellow)—who were not participating in his scheme to offer Wells Lamont the same discount as was being offered by the LTL carriers who were participating and making payoffs. Mr. Murphy states that he met with no resistance from the national carriers because he was agreeing to accept discounts less than those Wells Lamont otherwise could have received. Over time, Mr. Murphy states, the scheme further developed, and other LTL carriers agreed to participate. The inducement for their participation was the prospect of receiving profitable Wells Lamont business.

Mr. Murphy states that, in 1983 and 1984, when the scheme first began, the LTL carriers who agreed to participate in it provided Wells Lamont with discounts that were not substantially different from discounts offered by other carriers in the marketplace. The participating carriers nonetheless agreed to the scheme because they knew that, if they participated, they would continue to receive more business from Wells Lamont. As discounts increased in the industry from the years 1983 to 1992, from an average of 20% to more than 50%, Mr. Murphy avers, the participating carriers benefitted because he kept the discounts fixed at a level profitable to them. Thus, he asserts, from 1983 to 1992, he agreed with the participating LTL carriers to accept only marginal increases, and their discounts thus rose from 20%—25% (in 1983 to 1985) to a maximum of only 35% (in 1985 to 1992). Mr. Murphy adds that, whenever there was a change in the discounts of the LTL carriers making payments to him, he changed the discounts of the national carriers to further disguise the fact that the discounts Wells Lamont was receiving were not the discounts the company could have received through arm's-length negotiations. Mr. Murphy states that, during the period of the scheme, he was approached from time to time by representatives of various truck lines who were willing to provide Wells Lamont with discounts significantly deeper than those he had established with the carriers with which he was doing business. He rejected their offers, however, because any increase in the discount granted by one carrier would have revealed that the discounts Wells Lamont was receiving from the other LTL carriers were "below the market."

Mr. Murphy states that he believes that he could have negotiated discounts for Wells Lamont's freight-all-kinds (FAK) 77.5 rated traffic on average as follows: 1983 and 1984 - 25% to 30%; 1985 - 30% to 35%; 1986 - 35% to 40%; 1987 - 40% to 45%; 1988 and 1989 - 45% to 50%; 1990 - 55% to 60%; and 1991 - 60% to 65%.

Marmon next submits a statement by transportation consultant Greg Kozik. First, Mr. Kozik presents the results of a survey of a sampling of the discount items that the defendant carriers filed with the ICC between 1989 and 1992. In his opinion, the items reflect the discounts the carriers were required to offer shippers in order to obtain their business. The average of the discounts, Mr. Kozik argues, indicates the level of discounts generally available in the marketplace to the average shipper.

For his survey, Mr. Kozik chose discount items filed during March and September of each year between 1989 and 1991 and during March 1992 for freight being shipped from the Memphis area and from New Jersey. He did not include Wells Lamont's Reno facility because none of the defendants operated out of that point.⁷ In addition, with respect to four of the defendants, including Central and TCX, Mr. Kozik included all discounted items they filed during the period, regardless of points of origin, because there were relatively few filings for Memphis.

Mr. Kozik's survey shows as follows:

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>
average discount	46%	45.8%	52.5%	54%
low discount	25%	10%	30%	25%
high discount	65%	69%	74%	73%
items filed	598	1,119	644	465
items 35% or less	78	139	13	10
items 56% or more	44	65	180	159

With regard to the defendants participating here, the survey shows that, between 1989 and 1992, Central filed 335 items with an average discount of 55.2%; for the years 1989, 1990, and 1992, New England filed 609 items with an average discount of 45.2%; for the years 1989 through 1992, Old Dominion filed 381 items with an average discount of 49.8%; and, for the years 1989, 1991, and 1992, TCX filed 27 items with an average discount of 46.3%.

Mr. Kozik next presents a survey that was compiled by transportation consultant Michael Bange and submitted to the ICC as evidence in the Georgia-Pacific cases. Mr. Bange compiled extensive data concerning the percentage discounts allowed off LTL shipment rates by Pacific Intermountain Express (PIE) and by many of its competitors. He used information contained in the files of 330 shippers. Mr. Bange indicated that the shippers included businesses of many different types and sizes, located in every geographic region of the continental United States. He stated also that the commodities shipped were sufficiently varied so as to provide a broad range of types and classifications of freight to which the discounts were applicable.

The "PIE Survey" shows the following discount ranges and averages for the years 1984 through 1991:

⁷ Mr. Kozik indicates that 85% to 90% of Wells Lamont's subject traffic was shipped from its Memphis facility, 5% from its Sayreville facility, 5% from its Reno facility, and a minimal amount from its Chicago facility.

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>
average discount	26.8%	32.4%	34.7%	41.4%
low discount	15%	20%	15%	25%
high discount	45%	45%	52%	60%
percentage 35% or less	90.0%	71.4%	58.4%	29.6%
percentage 56% or more	0%	0%	0%	3.8%

	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>
average discount	41.4%	45.2%	46.5%	47.4%
low discount	10%	10%	20%	30%
high discount	55%	60%	70%	65%
percentage 35% or less	24.3%	10.5%	11.6%	6.3%
percentage 56% or more	0%	4.6%	9.1%	13.6%

Mr. Kozik also presents a survey that was prepared by traffic consultant Ray Bohman for a newsletter published in 1993. The “Bohman Survey” examined discounts published by the Middle Atlantic Conference (MAC) for its member carriers. The salient findings of the survey are as follows:

	<u>July ‘87</u>	<u>Oct. ‘88</u>	<u>Aug. ‘89</u>
average discount	36.23%	37.68%	41.80%
percentage 34% or less	42.72%	37.92%	24.13%
percentage 55% or more	0%	7.75%	7.03%
	<u>Sept. ‘90</u>	<u>May-Jn ‘91</u>	<u>Sept. ‘92</u>
average discount	46.00%	46.34%	51.60%
percentage 34% or less	12.22%	12.45%	2.30%
percentage 55% or more	8.52%	11.38%	31.28%

Mr. Kozik asserts that the results of all three surveys show that the 35% discount defendants gave Wells Lamont was well below the average discount available in the marketplace.

Mr. Kozik contends that, based on the characteristics of Wells Lamont’s traffic, the company would have been able to attract above average discounts during the time the kickback scheme was in

operation had it been able to solicit bids in an open process. In this regard, Mr. Kozik argues, first, that Wells Lamont's work gloves are desirable freight because they pack easily, can be loaded without difficulty, and are not susceptible to damage. As a second point, Mr. Kozik contends that the fact that freight is picked up in and moved out of major distribution centers such as Memphis, Chicago, or Sayreville is an important characteristic that attracts higher discounts. Third, Mr. Kozik avers that carriers give higher discounts to high volume shippers such as Wells Lamont, which expends approximately \$1.8 to \$2 million annually in transportation costs. Finally, Mr. Kozik asserts that freight that is "prepaid" as opposed to "collect" is more desirable and will attract a deeper discount, and he indicates that most of Wells Lamont's freight is shipped outbound prepaid.

Mr. Kozik also presents information regarding the average discounts received between 1988 or 1989 and 1992 by shippers who are similar in size to Wells Lamont or have transportation needs similar to those of Wells Lamont. Mr. Kozik presents information on four companies, summarized as follows.

Conwood Company, L.P. (Conwood) ships smokeless tobacco products (FAK class 85) from Memphis. During the relevant period, Conwood had an annual transportation budget of approximately \$3.5 million and negotiated discounts (as equalized⁸) of 52% to 68% from LTL carriers including two of the defendants. Colson Caster Corporation (Colson), of Jonesboro, AR, ships steel industrial casters and bumpers. During the 1988-1992 period, Colson had freight costs of \$1.3 million a year and negotiated discounts ranging between 45% and 60% with 30 to 35 LTL carriers, including five of the defendants. Penn Aluminum (Penn) ships aluminum extrusions and aluminum coil and tubing (FAK classes 60 and 85) from Murphysboro, IL. Between 1989 and 1992, Penn had a transportation budget of a little more than \$1 million a year but negotiated discounts of 65% (as equalized). Finally, Webb Wheel Products, Inc. (Webb) manufactures steel wheels and hubs, which it ships from Cullman, AL, and Siloam Springs, AR. During the 1989 - 1992 period, Webb spent only \$143,000 a year on outbound transportation, yet it received discounts of 30% to 60%, with an average of approximately 48%. Five of the defendants gave Webb discounts. Mr. Kozik believes that, considering the desirability of Wells Lamont's traffic relative to that of the above shippers, the 35% discount that Wells Lamont received was very low.

With regard to the matter of discounts available to Wells Lamont after Mr. Murphy's scheme was uncovered, Marmon presents the testimony of Terry Brooks, who replaced Mr. Murphy as Wells Lamont's Vice President of Distribution. Mr. Brooks indicates that, in anticipation of suspending use of the LTL carriers Mr. Murphy had been using for transportation from Memphis, Mr. Brooks contacted two carriers for service on an interim basis. Both offered a 50% discount off

⁸ The parties assert that it was a common practice for carriers to quote discounts off a lower freight classification than the one actually applicable to the subject freight. This practice served to mask from competitors the true discount given.

their class 77.5 rates for the same traffic the defendant carriers had been handling at a 35% discount.⁹

Thereafter, Mr. Brooks received bids from nine of the defendants. The carriers offered discounts off class 77.5 rates ranging from 50% to 65%. As most pertinent here, Central offered a 60% discount for transportation from Memphis to points east of the Mississippi River; New England offered a 50% discount for transportation from Sayreville to points in 12 states and the District of Columbia; Old Dominion offered a 60% discount for transportation between seven Wells Lamont facilities and points in the Southeast; and TCX offered a 52% discount for transportation from Memphis to points in four far western states and to points in Alaska and Hawaii.

Mr. Brooks also received bids from 24 LTL carriers that had not participated in the scheme. These carriers offered discounts ranging from 50% to 71% (as equalized).¹⁰ The majority of the bids related to transportation from Memphis, either alone or in conjunction with transportation from other facilities. A few of the bids were for nationwide service, but generally the bids related to service to small groups of states. For instance, Mr. Brooks indicates that Averitt Express, Inc. (Averitt) offered a 65% discount for transportation from Memphis to points in seven named southeastern states, and Atlanta Motor Lines, Inc. (Atlanta Motor) offered an equivalent 70.9% discount for service from Memphis to points in five southeastern states. Two carriers offered to provide service from Sayreville, and a third offered to serve Wells Lamont's facility at New Brunswick, NJ;¹¹ these carriers offered discounts of 55% to 60%. Four carriers offered to provide service from the Reno facility and offered discounts ranging from 50% to 60%. A number of the bids related to service from Wells Lamont facilities at points other than Memphis, Sayreville, and Reno. For instance, Mr. Brooks indicates that Willig Freight Lines offered an equivalent 69% discount for transportation from Wells Lamont's facilities in Sparks, NV, and Carlton, OR, to points in Arizona, California, Oregon, and Washington. He also testifies that Lewis Truck Lines, Inc., offered to transport Wells Lamont's goods from the company's facilities at Chicago and Niles, IL, to points in upper midwestern states at an equivalent discount of 71%.

In addition to providing information regarding bids received after discovery of the scheme, Mr. Brooks presents evidence of offers of discounts higher than 35% made by defendant carriers during the years the scheme was in effect. He found that, in 1987, Old Dominion offered Wells

⁹ We also note that Mr. Kozik states that he contacted two other named carriers for interim service from the Sayreville facility, and that those carriers also offered a 50% discount.

¹⁰ For instance, Brooks asserts that Beaufort Transfer Company offered Wells Lamont a 60% discount off its rates for FAK class 70 for transportation between Memphis and points in Arkansas and Missouri. Brooks further asserts that this equated to a 68.9% discount off rates for FAK class 77.5.

¹¹ As New Brunswick is near Sayreville, perhaps the carrier was referring to the Sayreville facility.

Lamont a 40% discount and that, in 1991, Batesville Truckline, Inc., offered a 60% discount. Nevertheless, those carriers continued to handle Wells Lamont's traffic at a 35% discount.

Marmon also presents a statement by Joe Powell, Vice President of National Accounts for Atlanta Motor. Mr. Powell states that, in 1993, Atlanta Motor was handling shipments from Memphis to Georgia, North Carolina, and South Carolina for Wells Lamont. The carrier was giving the shipper a 68% discount off the 1992 class 70 rates. Mr. Powell opines that a shipper similar to Wells Lamont would have received the following discounts during the time frame in question here: 1983 to 1985 - 25%; 1986 - 30%; 1987 - 40%; 1988 and 1989 - 45%; 1990 - 58.9% (equalized); 1991 - 63.9% (equalized); and 1992 - 70.9% (equalized). Mr. Powell adds that his figures are conservative and that a carrier wanting to attract a shipper's business away from another carrier would have needed to offer a discount at least 5 percentage points higher than those specified.

John Stinnette, National Account Executive for motor carrier Service Transport, states that, in 1992, his company gave Wells Lamont a 63% discount off class rates. Mr. Stinnette states that he considers Wells Lamont to be an account that can command above average discounts. In the Memphis area, Service Transport has more than 150 other accounts, and, Mr. Stinnette avers, Wells Lamont is in the top 10% of that group. If Service Transport had been allowed to compete for Wells Lamont's business between 1989 and 1991, Mr. Stinnette asserts, the company would have offered a 55% to 62% discount to obtain the account.

Randy Martin, Director of National Accounts for Averitt, indicates that his company began serving the Wells Lamont Memphis facility on a 50% discount basis in 1992 and increased the discount to 65% in July of that year. Averitt has continued to do business with Wells Lamont (apparently giving it a 65% discount) since that time.

Marmon concludes its presentation with argument and computations as to what "reasonable" discounts Wells Lamont should have received. Marmon points to the opinions of affiants; it examines the average discounts defendants offered after the kickback scheme was halted; and it makes estimates based on Mr. Kozik's assertions that Wells Lamont is in the top 10% to 20% of shippers in the LTL market.

Defendants' Reply.

Defendants have submitted joint argument, and each of them also has individually submitted evidence and argument. We first will discuss the joint argument. We then will discuss material in the individual statements that clarifies or supplements points made in the joint argument.¹²

¹² In discussing the joint arguments, we will refer to the defendants as "joint defendants."

Initial matters. Certain of the joint defendants' arguments and points should be noted at the outset. First, joint defendants contend that there is no statutory basis for a rate reasonableness determination, because petitioner has not brought an action seeking reparations under former 49 U.S.C. 11705(b)(3).¹³ Second, they argue that, as petitioner filed its court complaint on May 7, 1992, this agency has no jurisdiction to determine the reasonableness of a rate applied to shipments that moved before May 7, 1990. In support of this argument, joint defendants point to former 49 U.S.C. 11706(c)(2), which required that a person begin a civil action to recover damages under section 11705(b)(3) within 2 years after the claim accrues.

As we are simply providing advice to the court on rate reasonableness in accordance with the court's referral, we will leave these two matters to the court to consider. It will be for joint defendants to determine whether, in view of our findings here, they want to pursue these arguments with the court.

Also warranting note at the outset is joint defendants' objection to petitioner's assertions that they knowingly participated in the kickback scheme. Joint defendants emphasize that they were compelled to enter into agreements with Transportation Distribution Services, Inc. (TDS) as a condition to participating in Wells Lamont's traffic.¹⁴ Joint defendants state that they had every reason to believe that TDS was a legitimate property broker, that they entered into standard broker arrangements with that entity, and that there was nothing unusual about the arrangements to warrant any inquiry. Defendants add that they paid TDS 10% of the gross transportation charges they assessed Wells Lamont — a figure deemed average by industry standards.¹⁵

The matter of whether defendants knowingly participated in the kickback scheme is also a matter we must leave to the court to consider. The matter has not been referred to us and does not appear relevant to the sole issue before us—whether the rates charged were unreasonable.

Joint arguments regarding Marmon's rate reasonableness showing. Joint defendants contend that it is not possible for the Board to make its rate reasonableness determination on the basis of Marmon's presentation. This assertedly is because petitioner has not presented a shipment-by-shipment abstract of pertinent traffic that identifies carriers, numbers of shipments, commodities, origins, or destinations. Joint defendants point out that they did not all participate in the same Wells Lamont freight, operate in the same traffic lanes, serve the same origins, participate at the same time, or participate with the same frequency. The defendants decry Marmon's lumping them together as if each was responsible for the rates of the others. They argue that Marmon simply has glossed over an

¹³ As noted in our prior decision, Marmon's suit alleges violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, et seq., and common law fraud.

¹⁴ Although TCX dealt with a different broker, Trailer Load Carriers, Inc. (TLC), TCX's arrangements were essentially the same as those the other joint defendants had with TDS.

¹⁵ Defendants note, however, that they initially paid TDS 6%.

evidentiary void with the assertion that all of the defendants offered the same 35% discount based on the same freight classification of 77.5.

Joint defendants argue that, in the Georgia-Pacific series of cases, the ICC indicated a strong preference for considering the rates other carriers quoted at the same time as the defendant carrier for identical services. They assert that the agency rejected comparisons of rates that moved the traffic with rates that did not move it, and that the agency also rejected comparisons that involved rates the defendant carrier charged for the transportation of commodities not involved in the proceeding or that involved rates paid by shippers not involved in the proceeding. In joint defendants' view, then, Marmon's evidence is either of the type that has been rejected or does not address the Georgia-Pacific "market cluster" standard. Specifically, joint defendants question (1) the testimony of Mr. Murphy (which the defendants call "speculative"); (2) evidence from the three motor carriers that petitioner currently uses; (3) the rate quotes, which defendants claim were provided in response to an "orchestrated bidding contest;" (4) evidence from the Georgia-Pacific cases regarding average published discounts; (5) evidence of discounts other shippers in various parts of the country received for tendering dissimilar freight; and (6) the survey of the average and the range of discounts defendants published for all shippers between 1989 and 1992.

Joint defendants also argue that, in conducting an analysis under the Georgia-Pacific standards, the Board should give effect to the 10% broker commissions they paid. Joint defendants aver that the relationship between them and the broker was the precise relationship contemplated by law. They reiterate that they received legitimate broker services, and that they had no way of knowing what services the broker might have been providing Wells Lamont. Joint defendants conclude that the Georgia-Pacific reasonableness standards should be applied to the effective rate they had to offer to obtain the subject traffic — a 45% discount (a 35% discount plus a 10% brokerage fee) on class 77.5 freight.

Joint defendants also highlight what they deem to be deficiencies in Marmon's rate evidence, even when one ignores the 10% brokerage fee. First, joint defendants point out that, although the 35% discount was based on a 77.5 classification for all Wells Lamont traffic, some of the traffic was class 100 freight (dress gloves) and some was class 150 freight (work gloves moving on racks). Joint defendants emphasize that the equalized discounts for the other two classes of freight were 48% and 64.5%, respectively, based on rates within the Southern Territory, and 46.25% and 67.48%, respectively, based on rates within the Mid-Atlantic Territory. Thus, joint defendants argue that Wells Lamont actually received a discount greater than 35%. Defendants argue that Marmon's failure to present an abstract of shipments leaves the Board without a meaningful evidentiary basis for assessing what the effective discount was.

Next, joint defendants highlight Marmon's study of the discounts defendants published for shippers other than Wells Lamont. Joint defendants argue that Marmon's own survey undercuts its case, because it establishes that joint defendants published numerous discounts for other shippers at or below 35% and in the 35% to 40% range. Joint defendants argue that systemwide average

discounts, cited by Marmon as approximately 46% to 54%, have nothing to do with the relevant market cluster of reasonable rates.

A final asserted deficiency that is noteworthy relates to the discount offers made for Wells Lamont's traffic in the spring and summer of 1992. Joint defendants contend that evidence of the discounts they and others offered during that period has little bearing on whether the prior discounts were unreasonably low. Joint defendants assert that carrier costs, needs, and perceptions change, and defendants argue that, as relevant to this proceeding, the entire competitive structure had changed at the time of the bidding. An "open bid process" in the face of possible litigation, they assert, undoubtedly will produce the lowest level of rates, particularly if the use of a broker or intermediary is no longer a condition of doing business.

Joint defendants argue that petitioner's own evidence shows that joint defendants' rates were reasonable. In this regard, joint defendants assert that the only evidence comparing their rates for Wells Lamont's traffic with those of other motor carriers handling the same traffic in the same traffic lanes appears in Mr. Murphy's testimony and supports their position. As noted, Mr. Murphy indicates that three named non-defendant carriers also offered and provided Wells Lamont service at a 35% discount. Joint defendants point out that these carriers did not pay broker commissions in order to participate in the traffic.

Individual defendants' evidence. Central avers that, although Mr. Kozik refers to a range of discounts Central offered its customers, he does not cite the base rates from which those discounts were taken. As a result, Central argues, one cannot determine the actual rates charged. Further, Central asserts that references to the carrier's published discounts ignore contract rates Central had in effect during the relevant period. Central states that some shippers, in an attempt to mask the rates they actually pay, request that discount levels be published in a common carrier tariff even though Central is serving them as a contract carrier.

Central indicates that, during the 1989 to 1991 time frame, Wells Lamont was a \$120,000 per year account and provided the carrier with approximately .03% of its overall revenues. Central thus asserts that Wells Lamont certainly could not be classified as one of its largest customers. The carrier states, further, that the average shipment weights for Wells Lamont traffic during the period were between 577 pounds and 680 pounds — much less than the Central system average weight of well over 1,000 pounds. Central adds that Wells Lamont also made a large number of minimum weight shipments. The carrier asserts that both of these facts increased its cost of serving Wells Lamont.

Regarding the fact that Central offered Wells Lamont a 60% discount in February 1992, the carrier asserts that it was aware that the freight had been "put out for a bid" and that Central was competing with other carriers. It also states that it anticipated that the volume of traffic it would be receiving would be significantly greater than it previously had enjoyed.

Old Dominion contests Marmon's claim that Wells Lamont should have been entitled to a large discount. The carrier states that not all large volume shippers receive large discounts. Old Dominion asserts that many factors go into a determination as to the size of a discount, such as the carrier's need to generate traffic moving in specific lanes and its assessment of the desirability of the shipper's freight. Old Dominion states that Wells Lamont was not a sufficiently large or important shipper for the carrier to warrant publishing even an average discount for its freight. This carrier indicates that the arrangement with TDS did not generate any significant business. Specifically, Old Dominion asserts that, during the period February 1990 through February 1992, it collected \$65,000 in revenues from Wells Lamont for transporting its freight and paid TDS \$3,700 in broker commissions for generating the traffic. In terms of business size and importance, this volume placed Wells Lamont in the bottom one half of 1% of the shippers served during this period.

Old Dominion acknowledges that it offered Wells Lamont a 60% discount in 1992. Old Dominion asserts, however, that it was influenced by the promise, or at least the expectation, that the carriers Marmon selected would be tendered substantial volumes. Also, Old Dominion says it understood that it would no longer be directed to pay a broker commission as a condition of doing business. Finally, according to Old Dominion, the LTL business climate was beginning to change as many more competitors had entered the marketplace.

Old Dominion states that, during the pertinent time frame, it was a participant in a number of motor carrier rate bureaus, of which the Southern Motor Carriers Rate Conference was the most relevant to its core business, including carrying the traffic of Wells Lamont. Old Dominion presents the results of a survey of the discounts offered by 29 reporting bureau member carriers for the period January 1991 through August 1992. This survey shows that the average discount on relevant volumes of LTL traffic ranged between approximately 38% and 42%.

TCX transported LTL shipments from Wells Lamont's Memphis facility to points in California, Oregon, and Washington between August 1984 and February 1992. TCX indicates that it provided service to a number of other shippers from Memphis to West Coast destinations similar to those it served for Wells Lamont. According to the carrier, it gave some of those shippers a larger discount than it afforded Wells Lamont, and it gave some a smaller discount. TCX indicates that Wells Lamont was not its largest customer, and that the traffic handled for Wells Lamont was approximately one-tenth of that it handled for its largest account.

TCX emphasizes that the shipments it handled for Wells Lamont were not class 77.5 freight but, rather, were class 100 and class 150 traffic rated at class 77.5. TCX says it considered the class 150 freight (gloves hanging on display racks) bulky, "marginal freight." The carrier asserts that, in the early years of serving Wells Lamont, it handled substantial volumes of class 150 freight — even straight trailerloads consisting entirely of such freight.

TCX compares the discounts it gave Wells Lamont with those it gave Chromcraft Furniture in 1989 through 1991. Chromcraft was TCX's second largest account during those years. The carrier shows that it earned annual revenues between \$54,000 and \$93,000 from Wells Lamont as

compared with \$430,000 to \$508,000 from Chromcraft. TCX says the total percentage discount it gave Chromcraft amounted to 39%. TCX says that the discount it gave Wells Lamont amounted to about 45% when one considers the different classes of freight involved.

New England served Wells Lamont only from the Sayreville facility, and the predominant portion of the traffic it handled was class 100 freight. Thus, New England avers, it effectively gave Wells Lamont a 46.5% discount, not counting the 10% broker commission it paid.

New England asserts that the discount it provided Wells Lamont compared favorably to the discounts it provided numerous other shippers during the relevant period. The carrier indicates that, between December 1990 and June 1992, the period during which it handled Wells Lamont traffic, it had 1,134 other accounts that received discounts of 35% or less. New England avers that its shippers included hundreds of accounts that had and have sufficient traffic to afford them negotiating leverage. New England states that Wells Lamont, on the other hand, had no serious negotiating leverage. New England handled almost all of the Wells Lamont traffic in question during 1991. While the total revenues that carrier received from the shipper during that year amounted to approximately \$51,600, New England's total annual revenues for 1991 exceeded \$63 million.

Marmon's Rebuttal.

Marmon disputes defendants' argument that the 35% discount they gave Wells Lamont was reasonable because they gave other shippers the same discount or less. Marmon argues that, without some context in which to understand the discounts the other shippers received (such as types of traffic, volumes of business, and origins), the discounts given to those shippers cannot be compared with those given to Wells Lamont. Simply pointing to lists of shippers that assertedly received discounts of 35% or less, in Marmon's view, does not provide the required context.

Petitioner next contests defendants' arguments that Wells Lamont was not a shipper that could command a deeper than average discount. Marmon asserts that defendants have not provided a breakdown of their gross revenues by shipper and terminal location so that one could see where Wells Lamont fell in comparison with other shippers defendants were serving. Marmon contends that defendants' argument in this area is difficult to maintain in light of the fact that defendants increased their discounts by as much as 30% when they were forced to "bid honestly" for the business. Petitioner adds that defendants cite no evidence to support their assertions that changed market conditions warranted the substantially higher discounts.

Marmon argues further that the issue referred by the court was whether the "filed rates" the defendants charged were reasonable. Thus, petitioner argues, the rate at issue here is simply the filed rate, not some composite rate made up of a published rate, a broker's commission, and an undefined savings from a favorable freight classification. Marmon argues that the commissions paid to brokers to obtain a shipper's traffic are a carrier's cost of doing business, not an additional benefit

that effectively reduces the rate charged to a shipper.¹⁶ Marmon adds that, in any event, defendants have failed properly to calculate the effect of the 10% commission. Petitioner asserts that the defendants agreed to pay the brokers 10% of the gross revenues received, not 10% of the class rate. Therefore, petitioner avers, after the carriers received 65% of the base rate, they paid 10% of the revenues, or another 6.5%. The commission payment thus would effectively increase the discount to 41.5%, not to 45%.

Petitioner avers that defendants distort the significance of the fact that not all of Wells Lamont's traffic was class 77.5 traffic. Marmon asserts that the great bulk (85% to 90%) of its freight out of Memphis, and almost all of its traffic out of Sayreville, was properly classified as class 77.5 freight. The small percentage of its freight that consisted of gloves on display racks (termed class 150 freight by defendants), Marmon argues, is properly charged at class 77.5 rates under National Motor Freight Classification (NMFC) standards because the racks did not exceed 10% of the gross weight of the commodity displayed. Marmon adds that, even if its casual gloves should be classified as class 100 freight as defendants contend, the savings to Wells Lamont from having 10% of its Memphis freight charged at class 77.5 rates instead of class 100 rates is minuscule.

Marmon disagrees with defendants' contentions that petitioner's evidence does not meet the market cluster analysis criteria set forth in Georgia-Pacific. Marmon contends that it needed to present evidence regarding rates relating to "substantially similar" traffic, not "virtually identical" traffic. Marmon believes that it has presented persuasive evidence comparing the discounts defendants offered Wells Lamont with those offered other shippers for substantially similar traffic during the relevant time period. Marmon cites its survey of the discount items defendants filed during the period and its affidavits from shippers who tender traffic similar to that of Wells Lamont. In petitioner's view, the most compelling evidence is evidence of the bids defendants made after the kickback scheme was uncovered. According to Marmon, defendants then offered discounts much deeper than 35% to handle the same traffic for which they had offered only the 35% discount a month or so earlier.

Marmon concludes by contending that the abstract of shipments requested by defendants would not add anything to resolving the issue of what would have been a reasonable rate. Marmon asserts that such an abstract is unnecessary, because the defendants all gave Wells Lamont the same discount during the same period, they handled the same commodity, and they served the same origin (except for defendant New England, which served Sayreville). In addition, Marmon avers, because the defendants are basically in agreement with it on the amount of gross revenue Wells Lamont paid during the relevant period, there is no factual issue as to what rate actually was charged.

¹⁶ Marmon presents rebuttal argument on the matter of whether defendants knowingly participated in an illegitimate scheme that involved phony payments to brokers. We have noted that, although the parties are contesting it, this matter does not appear relevant to the sole issue before us — whether the rates charged were unreasonable. Accordingly, we will not attempt to make a finding on this matter.

DISCUSSION AND CONCLUSIONS

In our May 1996 decision instituting this proceeding, we announced that we would assess the reasonableness of defendants' rates in the context of this case using a Georgia-Pacific type "cluster" analysis, and we directed petitioner to submit rate comparison evidence with regard to each of the defendant carriers. Instead, Marmon has presented evidence that addresses only discount levels, not actual rate levels. A comparison of discount levels does not necessarily yield equivalent information, as the discounts in this case were not all applied to the same freight classification¹⁷ or the same base rate.¹⁸ Moreover, Marmon's grouping together of multiple origins would seem to preclude individual market analyses.¹⁹

Even assuming, however, that its discount evidence could suffice for a Georgia-Pacific type cluster analysis, Marmon has failed to make a showing of unreasonableness under the Georgia-Pacific standards. Under those standards, as set forth in GPac-I, 9 I.C.C.2d at 157:

We will determine the reasonableness of a challenged rate by comparing that rate with evidence indicating the location of the market-based cluster of price/service alternatives for the issue traffic.... If it can be shown that the challenged rate is significantly in excess of comparable rates that reflect the prevailing market rates at the time of the shipment(s) at issue, the challenged rate will be deemed unreasonable.

Moreover, 9 I.C.C.2d at 158:

We expect that the evidence will not establish a single market-based rate or service level. Rather, it will result in a cluster of rates and service levels that might conceivably have been chosen for the movements at issue. Rates noticeably outside this cluster would not have been used at the time by a willing shipper in the particular market involved and would be presumed unreasonably high.

¹⁷ While three of the defendant carriers handled mostly (but not entirely) class 77.5 freight for the petitioner, the traffic handled by New England was predominantly class 100 freight.

¹⁸ Even if the carriers had been members of the same rate bureau, they could have published exceptions to the bureau's class rates. Indeed, the record indicates that joint defendants did not all participate in the same bureau's rates. There is evidence that defendants participated in the rates of at least two different rate bureaus, for they refer to equalized discounts they gave based on rates within the "Southern Territory" and the "Mid-Atlantic Territory."

¹⁹ Consolidated Freightways, Roadway, and Yellow served the Memphis, TN origin, whereas New England served the Sayreville, NJ origin point.

In other words, to be deemed unreasonable, a challenged rate must be shown to have been noticeably outside the cluster.

We need not resolve here whether defendants' discount was 35% and no greater,²⁰ or whether the surveys introduced by Marmon reflect the discounts that were available in the particular market in which Marmon's traffic moved. Marmon has failed to make a prima facie showing under the Georgia-Pacific standards in any event. That is because, for every year of all three surveys, defendants' 35% discount is within the cluster of discounts available. Although defendants' discount levels were in the lower range of the discount clusters for each year, and they generally dropped lower within the clusters over time, they were never outside the clusters.

Moreover, while the surveys show ranges of discounts available, Marmon focuses on the average discounts. Marmon argues that the discounts Wells Lamont received were well below average, and that Wells Lamont's traffic warranted above-average discounts.²¹ However, the mere possibility that the shipper could have obtained a more favorable discount (rate) does not render the discount (rate) that it did receive unreasonable, so long as it was within the range or cluster of discounts (rates) paid for comparable traffic at the time.

We find:

Marmon has failed to establish that any of the rates charged by defendants for the transportation of Wells Lamont's traffic were unreasonable. There would accordingly be no basis for Wells Lamont to have recovered reparations from the defendant carriers under the Interstate Commerce Act as it existed prior to the enactment of the ICCTA.

It is ordered:

1. This proceeding is discontinued.

²⁰ It is not clear whether some or all defendants paid broker commissions based on 100% of their base rates, as opposed to the 65% of those rates they received from Wells Lamont in payment for transportation services. In view of our findings, we need not resolve this matter or whether the commissions should be considered part of the discounts.

²¹ An average tells us little. If four carriers were to offer discounts of 30%, 40%, 60%, and 70%, the average discount would be 50%, which no carrier offers. A range, on the other hand, gives us the required basis for comparison. In the above example, a 35% discount, although below average, would not fall outside the cluster and would not be found to be unreasonable.

2. A copy of this decision will be mailed to:

The Honorable Julia Smith Gibbons
United States District Court for the Western
District of Tennessee, Western Division
Clifford Davis Federal Building
167 North Main Street, Room 1157
Memphis, TN 38103

Re: No. 92-2386-G

3. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary